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A RAWLSIAN BASIS FOR CORE LABOUR RIGHTS

Abstract:

John Rawls's Theory of Justice is the most influential work of political philosophy of recent times. Rawls does not, however, consider the issue of labour rights. This paper considers the applicability of the rights of workers to join unions, bargain collectively, and to strike under Rawls's theory, in the context of empirical research showing how individuals are, in practice, best protected at work. We argue that, in developed countries at least, Rawls's theory supports the core rights of workers to organize, strike and bargain collectively with employers, under a combination of Rawls's first and second principles of justice. We then consider the international dimension, discussing how labour rights are to be viewed internationally both under Rawls's own international theory in his Law of Peoples, and under globalist interpretations of his theory of justice.

Key words:

International labour rights; justice; political philosophy; Rawls

International Labour Rights Today

The issue of labour rights has acquired increasing global salience as labour markets have been re-structured and global inequality has increased.¹ It has for example, been argued that a more developed, systematic and critical view of justice issues in labour management

¹ J Fudge, 'The new discourse of labor rights: From social to fundamental rights?' (2007) *Comparative Labor Law and Policy Journal*, 29, 29 – 66

is required.² It has also been suggested that even relatively developed legal national and regional approaches to labour rights based on versions of ‘voluntarism’ are inadequate.³ Further, the currently inadequate philosophical underpinning of labour rights deprives their advocates of depth of argument, which may in turn contribute to a loss of welfare for large numbers of workers.⁴ In responding to this third point, this article makes a modest attempt to link philosophy with labour rights by using Rawls’s theory of justice and interpreting it in the light of employment relations research.

The International Labour Organisation (ILO), in its Declaration on Fundamental Principles and Rights at Work (1998), refers to four core rights applicable to workers in all countries, regardless of their level of economic development. These are (a) freedom from discrimination, (b) freedom of association and right to effective collective bargaining, (c) freedom from compulsory or forced labour and (d) effective abolition of child labour. We concentrate in this paper, on (b); the freedom of association (i.e. right to organise) and the right to collective bargaining. These rights are today embodied in two of the eight fundamental ILO Conventions; namely Conventions 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and to Collective Bargaining). Nations that are signatories to these Conventions pledge to give workers the right to form and join organisations of their choice without interference. They also agree to establish mechanisms to guarantee these rights and to encourage negotiation between

² J Bonache ‘Towards a reexamination of work arrangements: an analysis from Rawls’s Theory of Justice’ (2004) *Human Resource Management Review*, 14, 395 -408

³ KD Ewing & GM Truter, ‘The Information and Consultation of Employees Regulations: Voluntarism’s Bitter Legacy’ (2005) *Modern Law Review*, 68, 4, 626-641.

⁴ Collins, H. (2011), “Theories of Rights as Justifications for Labour Law” in G. Davidov and B. Langille, *The Idea of Labour Law* (Oxford University Press, 2011) pp.137-155

employers' and workers' organisations. These rights are similarly recognised in other international instruments, such as the UN Universal Declaration of Human Rights 1948 (*Article 20*), International Covenant on Economic, Social and Cultural Rights 1966 (*Article 8*), the UN Global Compact 2000 (*Principle 3*) and the OECD Guidelines for Multinational Enterprises 1976 (*Chapter 3*).

Despite the supposedly universal nature of these rights and their identification as core labour rights, and despite various attempts to regulate and streamline labour standards at international level, they have continued to be resisted by many countries. This is particularly the case in the developing world, although some developed countries have also been reluctant to accept them.⁵ Canada and the United States, for example, have not ratified the ILO Convention 98. In the UK, the goals of labour law policy, dominated by the need to enhance competitiveness,⁶ has led to comprehensive attacks on the institutions of collective bargaining, with marginal attention being paid to the 'social rights' of workers or the reality of the power of multinationals.⁷ Discussions at European level on how to tackle 'flexicurity' (flexibility in the labour market plus secure guarantees for workers) have, to date, only brought about limited enhancement of worker rights despite repeated pleas for

⁵ E Neumeyer, & I de Soysa, (2006), "Globalisation and the right to free association and collective bargaining: An empirical analysis", pp. 1 – 50, London: LSE Research Online, at <http://eprints.lse.ac.uk/archive/00000628>

⁶ H Collins, (2001), "Regulating Employment for Competitiveness", *Industrial Law Journal*, 30, 17-47.

⁷ P Davies, (1993/1994), "The Representation of Workers in the United Kingdom from Collective Laissez Faire to Market Individualism" *Comparative Labour Law Journal*, 15, 167 – 176, B Hepple, *Rights at Work: Global, European and British Perspectives*, *The Hamlyn Lectures 56th Series*, Sweet & Maxwell, 2005, KW Wedderburn, (2007), "Labour Law 2008: 40 Years On" *Industrial Law Journal*, 36, 4, 397 – 424

workers to be guaranteed fundamental rights by labour market policy.⁸ The ITUC recently pointed out (2010) that the implementation of the core rights is often weak even in those countries which have ratified the conventions. It suggests that many countries, despite a call by G20 leaders, have used the recent global crisis as a pretext for weakening and undermining trade union rights.⁹ Indeed, core labour rights remain vulnerable in the face of globalisation, the erosion of the employment relationship itself through varied means and the resultant decline in trade unionism.

Developing countries are even more resistant to adopting core labour rights. Their denial is justified in terms of a prior need to achieve economic growth, linked to and justified by the language of modernity and ‘trickle-down’ economics.¹⁰ It is claimed that the adoption of core labour standards undermines the comparative advantage they enjoy, especially in the production of low value-added goods.¹¹ The argument is that developing countries must first develop before they can meaningfully engage in the ‘rights’ discourse¹² and that the implementation of labour standards currently encouraged by the ILO is highly premature,

⁸ See as a sample of the literature, T Wilthagen, & F Tros, (2004), “The concept of ‘flexicurity’: A new approach to regulating employment and labour markets” *European Review of Labour and Research Summer*, 10, 2 166 – 186, T Bredgaard, F Larsen, & PK Madsen, (2006), “Opportunities and challenges for flexicurity - The Danish example” *European Review of Labour and Research*, 12, 1, 61-82, R Muffels, & R Luijkx, (2008), “Labour market mobility and employment security of male employees in Europe: Trade-off or Flexicurity?” *Work Employment & Society*, 22, 2, 221-242, A Tangian, (2007), “European flexicurity: Concepts, Methodology and Policies” *European Review of Labour and Research*, 13, 4, 551-573, J Due & JS Madsen, (2008), “The Danish Model of Industrial Relations, Erosion or Renewal?” *Journal of Industrial Relations*, 50, 3, 513 – 529

⁹ ITUC (International Trade Union Confederation), Annual Survey of Violation of Trade Union Rights, 2010 at <<http://survey.ituc-csi.org/>>

¹⁰ For a trenchant recent critical discussion, see FR Kahn, R Westwood & DM Boje (2010), “I feel like a foreign agent: NGOs and corporate social responsibility interventions into Third World child labour”, *Human Relations*, 63, 9, 1417 – 1438

¹¹ See M Busse (2002), “Do Labor Standards affect Competitive Advantage in Developing Countries?” *World Development* 30 (11): 1921-1932, C Scherrer (2007), “International Workers’ Rights and Competitiveness” *Labour, Capital and Society*, 40(1/2), 135 – 159, at 144 – 146.

¹² These views have long been held by the IMF, OECD and World Bank, all which have held that laws which protect worker rights are not conducive to attracting capital and investment.

counterproductive and even neo-imperialist. Those opposing the regulation and enforcement of labour rights also contend that they are obstacles to closing the ‘industrial gap’ between themselves and more developed countries. They argue that ‘free’ labour markets promote the efficient allocation of resources and that, in the fullness of time, industrialisation will lead to better living and working conditions for workers. Imposing a legal obligation on firms to observe stringent labour standards is liable to lead to high labour costs and low employment, production and income levels, making it more difficult for developing countries to attract foreign direct investment.¹³ These propositions are utilitarian, unsurprising since both neo-liberalism and utilitarianism have been linked philosophies since their nineteenth century origins.

Yet it is accepted that the rights to organise and bargain collectively help redress the inherent imbalance in the employment relationship.¹⁴ As we discuss below, the right to collective bargaining is a vital tool in reducing inequalities, raising wages and improving workers’ health and safety. We note that for all their arguments, neo liberal approaches to labour regulation have been powerfully challenged by empirical research. Elliott & Freeman¹⁵ for example, challenge the ‘trickle-down’ effect and argue that there is in fact no

¹³ R Stern & K Terrell, (2003), “Labour Standards and the WTO” University of Michigan, Research Seminar in International Economics Discussion Paper, no. 499, at <<http://www.fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>>, J Hall & P Leeson (2007), “Good for the Goose, Bad for the Gander: International Labor Standards and Comparative Development” *Journal of Labour Resolution*, 28, pp. 658 – 676.

¹⁴ RB Freeman & J Medoff (1984), *What Do Unions Do?* (New York: Basic Books) see especially Chapters 1, 3 – 10, which demonstrate, in the various aspects of employment e.g. wages, benefits, tenure and turnover, that unions generally are a force for good. Importantly, for the workforce, unions provide higher wages and benefits and a voice at the bargaining table and on the shop floor.

¹⁵ KA Elliott & RB Freeman (2003), *Can Labor Standards Improve under Globalization?* (Institute for International Economics, Washington DC)

contradiction between ‘development’ and labour rights. Freeman presents evidence to show that to the extent that legal protection of *property* rights is an important contributor to economic growth, so too is the protection of *labour* rights, particularly in developing countries. He rejects the commonly held view that protection of labour rights is negatively associated with economic success when compared to the protection of property rights.¹⁶ In short, and contrary to the arguments advanced by neo-liberal legal theorists,¹⁷ he suggests that there is no ‘zero-sum game’ in the rights of employers and workers whereby a gain by one party must necessarily result in a loss by the other.

Whilst recognising the importance of these practical and empirical disputes, we supplement them with a philosophical argument. We propose that the rights to organise and bargain collectively have a philosophical basis that may be derived from Rawls’s theory of justice.

Our Approach to Rawls

We adopt the political philosophy of John Rawls (1921 – 2002) as a basis within which to discuss the rights to organise and collective bargaining. Rawls’s contributions have been used in discussions of business ethics.¹⁸ We base our arguments around his *magnum opus*, the *Theory of Justice*. Where relevant, we draw on his later works, notably *Political Liberalism*, *Justice as Fairness*, and *The Law of Peoples*.

¹⁶ RB Freeman, (2003), “Labour Market Institutions and Employment Policies: The International Experience” *Estudios de Economica*, 30, 1, 5 – 20.

¹⁷ J Botero, S Djankov, R La Porta, S Lopez-de-Silanes & A Shleifer, A. (2004), “The Regulation of Labor”, *Quarterly Journal of Economics* 119, 1339 – 1382

¹⁸ N Doorn, (2010), “Applying Rawlsian approaches to resolve ethical issues: Inventory and Setting of a research agenda”, *Journal of Business Ethics*, 91, 1, 127 – 143

Rawls's works have attracted criticism, with many philosophers disagreeing with his suppositions in relation to the nature and function of the state, for the apparently 'unencumbered' and atomistic nature of individuals in his thought, or for adopting an imperfect notion of 'liberty'. The libertarian philosopher Robert Nozick, for example, rebuts Rawls's argument that there is such a thing as a just 'distribution' of goods or that it is the state's responsibility to ensure such a distribution. Similar criticisms have been levelled by socialist and feminist critics.¹⁹ Nozick counters Rawls's view of redistributive justice, arguing for a minimal state, contending that when a state assumes more responsibilities, rights will be violated.²⁰ Republican theorist Philip Pettit critiques the liberal view of freedom (including Rawls'). He contends that we should conceive of liberty as freedom from *non-domination*, rather than as freedom from *non-interference*, as on the liberal view. To take the example of a benevolent slave master, the slave is still *not* free even though the master may not exercise his power. The slave remains a slave.²¹ Others have criticised Rawls for taking a universal view of rights, contending that values and beliefs are shaped by the cultures and values of specific communities, and that these vary from country to country.²² It is beyond the scope of this paper to address these criticisms. We recognise the merits of these differing views. We do not assert that Rawls, in any of his

¹⁹ See for example IM Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); N Fraser, *Justice Interruptus* (New York: Routledge, 1997).

²⁰ R Nozick, *Anarchy, State and Utopia* (Basic Books: USA, 1974).

²¹ P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997). For an argument that Rawls's notion of liberty *can* be interpreted in the way republicans view liberty, see V. Costa 'Rawls on liberty and domination' (2009) *Res Publica*, 15, 4, 397 – 413.

²² Scholars with communitarian tendencies include A. McIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988); M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: CUP, 1996) and C. Taylor, *Sources of the Self* (Cambridge: CUP, 1989). For a helpful work comparing the views of these authors and those of Rawls, see N. Cropp, 'The social utility of Rawls's Theory of Justice: Can it help us avoid unjust systems?' (1998) *UCL Jurisprudence Review*, 188 – 211.

works, produces the correct theory of politics. The question of what political theory is appropriate for any purpose, general or particular, is a question outside the scope of this exercise. Rather, this paper is an academic attempt to see if Rawlsian premises lead to support for labour rights, not to defend those premises. The reason we are interested in Rawls is not that we think he is correct. It is rather because of what we might term the objective historical importance of Rawls's thought. The importance of Rawls's work does not lie in a consensus that it is correct in its details. Few people accept Rawls's thought as correct in toto; indeed, it is rare for any philosopher's thought to be accepted in a pure form. Rather, the importance of Rawls's work lies in its preponderant influence on subsequent political thought. Our interest in Rawls then derives from his seminality, not from fidelity to his ideas. This being the case, we focus on the work of Rawls's which is most influential, namely his *Theory of Justice*, rather than on his 'mature' position articulated most clearly in *Political Liberalism*. The *Theory of Justice* has a singular importance of its own, such that G. A. Cohen can claim that it is possibly the most important work of political philosophy ever written, a title for which only Plato's *Republic* and Hobbes's *Leviathan* might hope to challenge it.²³ It is of course necessary nonetheless to consider the *Theory of Justice* in the context of Rawls's broader thought.

So, we take Rawls's *Theory of Justice* qua the most influential contemporary political philosophy, and we take the ILO's declaration qua the most weighty single international convention on labour rights, and bring these together. However, these two are hard to relate to one another, for two main reasons, which will be dealt with in detail one after the other in due course. The first is that Rawls has almost nothing to say about labour rights. The other problem is that the *Theory of Justice* is supposed to apply primarily to the

²³ G. A. Cohen, *Rescuing Justice and Equality* Boston, MA: Harvard University Press, 2008, p. 11.

national case, where the latter is global in scope. Rawls does propound his own idiosyncratic theory of international relations in the *Law of Peoples*. However, certain interpreters of Rawls have argued that Rawls's restriction of the theory of justice in this way is unnecessary and even incoherent. They argue against Rawls that his core national theory of justice, or at least more aspects of it than he allows, ought to apply globally.²⁴ These arguments indicate that *Law of Peoples* is actually only tangentially and contingently related to the *Theory of Justice*.

The main body of our argument will deal with the implications of Rawls's *Theory of Justice* for labour rights in the national case. According to a globalist reading of Rawls's theory, these consequences actually extend worldwide via international institutions, such as the ILO. According to Rawls, however, implications of the *Theory* only apply for liberal democracies. We will therefore in addition at the end of the article consider the applicability of core labour rights under his law of peoples. Our question then in terms of the ILO declaration is primarily the applicability of these principles in our society, and only separately the applicability of these principles as a global norms connected to international institutions.

Whatever the scope of applicability of Rawls's theory, we note that it is a political theory only, rather than a complete moral or ethical theory, hence "political, not metaphysical".²⁵ In his later works, he articulates a political theory intended to obtain an overlapping consensus from many different comprehensive moral views. The justification

²⁴ Andrew Kuper, 'Rawlsian Global Justice : Beyond the Law of Peoples to a Cosmopolitan Law of Persons', *Political Theory* 2000 28: 640; Thomas Pogge, *Realizing Rawls*, Ithaca, NY: Cornell University Press, 1989; Thomas Pogge, 'An Egalitarian Law of Peoples', *Philosophy and Public Affairs* 23 (3):195–224. 1994).

²⁵ Rawls, J. (1985), "Justice as Fairness: Political not Metaphysical", *Philosophy and Public Affairs*, 14, 3, 223 – 251.

of political institutions, and political rights, for Rawls, is distinct from ethical argumentation in a number of important ways, in part because of what he calls the ‘burdens of judgment’: people who engage in sincere moral reasoning, and who look at the same range of facts, will not always come to the same moral conclusions, even over the long run.

Rawls’s Theory of Justice

Rawls’s *Theory of Justice* has as a basic axiom that ‘justice is the first virtue of social institutions’; that is, that social justice was primarily a matter of correctly organising society’s major institutions,²⁶ which he termed the ‘basic structure of society’. This structure is of paramount importance because it determines how basic rights, opportunities, income and wealth are distributed. Rawls drew heavily on Kant’s ideas regarding the autonomy and dignity and worth of the individual, while also developing the Enlightenment political-philosophical concept of the ‘social contract’, that is, the hypothetical coming together of individuals voluntarily to agree on the foundational rules for social governance.²⁷

The obvious problem for such ‘contractarian’ thought is that of how people would reach agreement about the rules which should govern their society. Rawls sidesteps the problem by retaining the notion of a social contract as a purely hypothetical element of a theory of

²⁶ *Theory of Justice*, 1999, 3.

²⁷ “...the principles of justice for the basic structure of society are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further arguments; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness”. (*Theory of Justice* 1971, 11)

justice. That is, we ask in the here and now what we would do if we were in a position to impartially consider how society should be structured. This appeals to our capacity to think beyond our partial interests to pose the question of what a fair society would look like. Rawls does this via a detailed thought experiment in which he imagines hypothetical ‘representative persons’ shorn of their partiality, meeting in what he calls the ‘original position’. It is characterised by a ‘veil of ignorance’ which ensures impartiality by preventing participants from knowing any details about their social position or identity in the real world, without the particular prejudices and personal characteristics that ordinarily prevent people from agreeing:

‘...no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance...’ (*Theory of Justice*, 1971: 12).

The position is entirely hypothetical but allows us to ascertain what is *fair*, which for Rawls is coterminous with what is *just* where the structure of society is concerned.

The original position is only a device within Rawls’s overall theory of justice, however, if a vivid emblem of the whole. Rawls’s general procedure for determining what is just is what he calls ‘reflective equilibrium’. This means starting with certain intuitive ideas about what justice means, using these as the basis for developing a theory, which then affects one’s

intuitions, which as adjusted can then be used as the basis for further refinements of the theory, and so on, until intuitions and theory are in accord and a stable conception of justice is reached. The articulation of the 'original position' occurs as part of this movement, based on intuitions but then changing our intuitions in its turn, which then have a reciprocal influence on its articulation and so on.

Individuals in the 'original position' would therefore agree with many of our intuitive judgments about justice. For example, they would want to structure society such that discrimination on the basis of race and gender was minimised: since people in the original position do not know their own gender and race, they will want to ensure that the social contract will not disadvantage them. Individuals in the original position are taken to be rational maximisers of their own utility. This is necessary to ensure an outcome from the original position that is just. Rawls argues that the rational way to act is to take care to maximise the worst possible outcome from a situation (sometimes called the 'maximin' strategy). We should be concerned with the worst realistic scenario in a situation and take care first to ensure that in that situation we will be as well protected as possible.

The upshot of this is that a major arbiter of justice for Rawls is the well-being of the worst off 'representative person' in a given society: when choosing between two social arrangements, the representatives in the original position would choose the one in which the worst-off person would be the best taken care of, since those in the original position would be concerned that they might themselves be this disadvantaged person. Rawls argues that the society in which the relatively worst-off person is best-off in absolute terms is a liberal

market society with considerable inequalities in wealth which drive the economic productivity of society as whole, though he is indifferent as to whether the ownership of the means of production in such a society be capitalist or socialist, that is, private or public.²⁸

First principle of justice

Before such economic considerations, Rawls believes that people in the original position would be concerned to ensure that they are afforded certain basic rights. Therefore, Rawls's first 'principle of justice' is concerned with basic liberty, not economics: this principle is a variation on the liberal principle of liberty, that one should be free to do whatever one wants so long as it harms no-one else; Rawls's formulation is that

'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all' (*Theory of Justice*, 1999, 46).²⁹

These basic liberties, for Rawls, include freedom to participate in the political process, freedom of association and assembly, of speech, of conscience and freedom of thought, of the person, from arbitrary arrest and seizure and the right to hold personal property.³⁰ Thus, *through* the atomistic conception of individuals, their rights to associate and assemble are

²⁸ 1999, p. 242.

²⁹ How conflicts between one basic liberty and another are to be reconciled is a difficult issue. Rawls argued that liberty can be restricted only for the sake of liberty; a less extensive liberty must strengthen the total system of liberty shared by all; and a less than equal liberty must be acceptable to those citizens with the lesser liberty. See N. Bowie, 'Equal basic liberty for all' (1980), 118 – 124 for a helpful discussion.

³⁰ *Theory of Justice*, 1971: 61

recognised. For Rawls, these collective rights derive from and are dependent on individual rights.

Second principle of justice

Only after establishing these basic liberties, does Rawls argue that those in the original position would go on to formulate a Second Principle of Justice, which essentially concerns the distribution of goods, including both material wealth and more abstract things such as further rights. Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity. (*Theory of Justice*, 1971: p. 302)

This latter ‘equal opportunity’ clause requires that everyone with the same native talents, abilities and skills has the same economic opportunities, irrespective of their backgrounds.

Rawls allows for inequalities of *outcome*. Such social and economic inequalities (i.e. wealth, income, power and authority) are only permissible if *these inequalities are to the benefit of the least advantaged* (the ‘difference principle’). Thus departures from equality were only permitted to the extent that the inequality improves the position of those who would be least advantaged. Society could give more income, status or power or authority to some than to others, but only if, by doing so, life would be better for the disadvantaged.

What Rawls did not permit was social and economic inequalities which made life better for any (no matter how many), that disadvantaged the worst-off; throughout his works, he

explicitly opposed utilitarianism.³¹ Thus, the second principle allows forms of inequality that are *limited and strictly conditional*. Rawls gives equality of opportunity priority over the difference principle.

Applying Rawls's theory

The relevance of Rawls's work to our subject is not immediately obvious, and indeed his strong emphasis on individual rights under the first principle might be assumed to render it inapplicable to a discussion of *collective* rights. Rawls says very little about labour rights in his works.³² This has not deterred scholars from linking Rawls's philosophy to workers and the workplace, however. Hsieh, for example, argues that Rawls's 'justice as fairness' entails protecting workers by granting them a basic right to adequate protection against arbitrary interference in the workplace on the basis that if a worker is arbitrarily interfered with, this would be treating him or her as lacking in standing or in worth, which in turn damages his or her capacity to develop a sense of self worth and self confidence, an essential feature of Rawls's theory.³³ Hsieh contends that the effective exercise of the right

³¹ Rawls explicitly rejects utilitarianism on two main grounds – one, that it ignores the distinctiveness of persons, and two, that it defines what is right in terms of what is good. Yet this is contentious. It has been argued that there is actually a great deal of common ground between Rawls's theories and utilitarianism; see S. Brett, 'Rawls's theory of justice and his criticism of utilitarianism' (1994) *UCL Jurisprudence Review*, 1, 59 – 73; H. Goldman, 'Rawls and Utilitarianism' In H. Gene Blocker, & E.H. Smith (Eds.), *John Rawls's Theory of Social Justice: An Introduction* Athens (OH: Ohio University Press, 1980, 311 – 345).

³² Levine, P. (2001) "The Legitimacy of Labour Unions" *Hofstra Labour & Employment Law Journal*, 527 – 571, at 528 and 533, Hsieh, N. (2005) "Rawlsian Justice and Workplace Republicanism" *Social Theory and Practice*, 31, 1, 115 – 142, Levine points out that although Rawls said nothing explicit about unions, he did assume that in a well-ordered society, democratic institutions (such as law-making bodies) ensured fair treatment for all, while citizens pursued "their more particular aims" within various "social unions," which include formal associations, families, and friendships (*Theory of Justice, revised edition, 1999*, at 462 – 464). It is possible to argue that labour unions are an example of such associations envisaged by Rawls.

³³ Recall that Rawls argued that for something to be accorded the status of a basic right, it must be counted among the social basis of self respect, which are "those aspects of basic institutions

to protection against arbitrary interference might require the establishment of bodies or agencies such as adjudicative bodies internal to the firm, committees or worker representation rights on the board in order to contest managerial decision making. Specifically, he envisages that unions can play a role as a body to constrain the scope of managerial discretion in the workplace.³⁴ We will consider his arguments and those of the raft of other scholars who have applied Rawlsian political philosophy to labour issues below.

Applying Rawls's theory to collective labour rights is for us a matter of asking where, if anywhere, in his schema, these rights can be said to apply: are they guaranteed under the first principle, the second, are they merely something that is just for the constitutions of particular kinds of society, or indeed are they not supported by Rawls's theory of justice at all? In what follows, we consider the core labour rights in the 'lexical' order used by Rawls, so first the under the first principle, then the second.

The first principle

The first principle mandates a set of basic equal rights for all members of a society, and that we should have as many as are possible on that basis. Thus, for any given right, there is a presumption that we should be accorded it as long as our enjoyment of that right does not impinge on anyone else's rights. Rawls viewed the exercise of basic liberties as so central that it may be restricted only if that were needed to protect some other basic liberty, or

normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self confidence". Rawls, 2001, p. 59.

³⁴ NH Hsieh (2005) "Rawlsian Justice and Workplace Republicanism" *Social Theory and Practice*, 31, 1, 115 – 142

would lead to a greater overall liberty in the scheme of basic liberties, or in extreme situations of material distress.³⁵ It is unjust, from a Rawlsian perspective, for governments or firms to make deals (from a position of power) with workers to sacrifice or restrict any basic right in order to secure an increase in material living standards. The *lexical priority* of liberty prohibits this sort of restriction of basic liberties.

Recall that Rawls included within the list of basic liberties the right to vote, freedom of speech, freedom of the person and the freedom of association. Rawls does not comprehensively catalogue what freedoms might be held to obtain under this principle, however – his remarks relating to its practical content are at best suggestive. The fact that a right is not explicitly recognised here by Rawls ought not then be taken to imply that he was deliberately excluding it. Why this is significant will be revealed shortly (in relation to a right to strike).

In terms of the ILO's Declaration on Fundamental Principles and Rights at Work, three of the four principles declared there are already explicitly recognised by Rawls in his *Theory of Justice*, at least in part, as fundamental rights covered by his first principle of justice, that is, as rights that people in the original position would identify as core. There is a principle that forced labour should be eliminated, which one can easily identify with Rawls's claim that slavery is unjust under the first principle (no one would be willing to countenance a world in which they might be a slave). There is an ILO right to the elimination of

³⁵ Falsely shouting fire in a dark crowded place which puts others' lives in danger, making speeches inciting people to riot or retaliate with violence, conspiracies to commit crimes, etc. as they jeopardise the freedom and integrity of others. Readers may find Freeman's detailed discussion on Rawls's priority of liberties helpful, see S. Freeman, *Rawls*, (Routledge, 2007, 66 – 84).

discrimination; compare Rawls's claim that racial discrimination is obviously unjust.³⁶

Only the principle that child labour should be abolished finds a lacuna in Rawls, inasmuch as he has nothing to say on this issue.

We will not be concerned with any of these principles, however, in any case. We will focus squarely on the first, the 'freedom of association and the effective recognition of the right to collective bargaining'. Now, this is a compound principle, combining two rights on the face of it: freedom of association is coupled with the right to bargain collectively. Of these, the first is clearly supported by Rawls as a basic right under the first principle. He moreover holds that 'The government has no authority to render associations either legitimate or illegitimate'.³⁷ This implies that we are free to join unions, since there is no authority to determine that unions are an illegal organisation, and we have the freedom to associate with whomever we want (unless it be in the pursuit of an unlawful activity, or in conditions of dire emergency). This unrestrained freedom of association further implies the right of associations to in turn associate with other associations. Hence, labour unions have a right to have fraternal relations with one another, and to communicate with employers and employers' associations.

'Collective bargaining', however, is not mentioned by Rawls. Indeed, the collective rights of labour, and the entire possibility of a 'collective' right, is a lacuna in Rawls's discussion, though since he does name freedom of association, which is categorically a collective right (though, for Rawls, rooted in individual rights), we have evidence that he does not oppose such rights *per se*.

³⁶ Rawls, *Theory of Justice*, 1971: p. 17.

³⁷ Rawls, *Theory of Justice*, 1999, 186.

There is good reason that the rights of freedom of association is conjoined with the right to collective bargaining in the ILO Declaration: the right to belong to a union is meaningless if that union is banned from actually operating as such in the workplace. That is, a labour union is an association that exists to the end of collective bargaining. However, the right to associate is logically distinct from any right to conduct a particular activity in association with others.

Indeed, a right to bargain collectively, far from being simply neglected, is in effect explicitly excluded by Rawls under the first principle, when he excludes the freedom to enter into contracts from his schedule of basic liberties.³⁸ This exclusion does not mean that Rawls wants to forbid people from negotiating contracts – it is just that he does not think this is a basic freedom under the first principle. Rawls wants to allow that, pursuant to the second principle, the state may restrict people's freedom to contract. This could include contracts between employers and employees. Indeed, a minimum wage or any legislated minimum working conditions would constitute a limitation of the freedom of negotiation. Hence, the limitation seems to be quite compatible with a concern for the interests of workers. There can be no complete right to collective bargaining under the first principle, because such an untrammelled right would not even be desirable, since it implies the right to make grossly unfavourable and exploitative agreements. Indeed, an unlimited right to enter into contracts would lead to the situation famously outlined by Robert Nozick using the example of Wilt Chamberlain, leading to the collapse of the entire second principle of justice qua attempt to influence the distribution of goods: people would be free to get into

³⁸ Rawls, *Theory of Justice*, Revised Edition, p. 54.

relationships that would be economically bad for them and that the government would be powerless to remedy entirely.

That being the case, it would be very surprising if the ILO were to demand such a complete right to bargain, so of course it does not, but rather only ‘the *effective recognition* of the right to collective bargaining’ (our emphasis). We take ‘effective recognition’ to mean that some substantial right to collective bargaining ought to be recognised, but without implying total government non-interference. The question then is whether ‘effective recognition’ is something one could mandate under the first principle. I think the answer must be ‘no’. ‘Effective recognition’ effectively implies a right mitigated not only by its compatibility with other rights guaranteed by the first principle (one does not demand an ‘effective recognition of the freedom of conscience’, but rather simply demands the freedom of conscience), but according to other considerations. We will therefore leave consideration of the right to bargain collectively for now until we reach the second principle

There is another right for us to address here under the first principle. Even the right to bargain collectively as asserted by the ILO is, taken in isolation, a hollow right. It is necessary to have the possibility of recourse to industrial action in some form to back one’s bargaining position in order for a right to bargain to be substantive. If it is illegal for workers to take any action opposing an employer’s interests, then the right to bargain is meaningless, since the employer is free to ignore workers’ attempts to negotiate.

We therefore must consider not only the rights to organise and bargain collectively, but also the right of labour to *act* collectively. The paradigmatic form of such a right of labour, the

one most often discussed, is the right to *strike*, though other forms of industrial action exist. A right to strike is often mooted and has been seriously considered by the ILO for adoption as a declared right, though the ILO has not heretofore put it forward as a core right in the way it has other rights. That the ILO should be relatively conservative in asserting the rights of labour is unsurprising, given its tripartite structure and diplomatic position. However, the ILO has in various places outside of its most fundamental documents acknowledged that the right to bargain collectively implies a right to strike.³⁹

The right to strike appears as a special and controversial case, then, but we argue that from a rights perspective it is a simple, fundamental freedom. The right to conduct industrial action is in effect that to withdraw their labour in some way (quitting, striking, going slow) unless collective demands are met. As individuals, every worker, if they are not a slave (and slavery is explicitly not permitted under Rawls's first principle) has a right to withdraw their own labour, and might of course threaten this in individual negotiations with their employer. Effectively, what occurs in industrial action is a pooling of individual rights into collective rights, via the individual freedom to associate with our peers, and in this respect we may still discuss these collective rights *qua* individual rights under Rawls's first

³⁹ For example, the text on the ILO website glossing the rights of freedom of association and collective bargaining asserts that 'The right to strike has been recognised internationally as a fundamental right of workers and their organisations and as an intrinsic corollary to the right to organise' – <http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>, accessed 29/3/11. For the fullest account of the right to strike in relation to the ILO, see the ILO document 'ILO Principles Concerning the Right to Strike', 1998, which details the motions that have been passed at ILO meetings supporting the right to strike, but points out that the Employers' Group within the ILO in particular maintains that the ILO has recognised no such right *per se*. https://owa.mdx.ac.uk/owa/redir.aspx?C=7dc0dc01f8ac4b03ac519acc91e10d47&URL=http%3a%2f%2fwww.ilo.org%2fwcmsp5%2fgroups%2fpublic%2f%40ed_norm%2f%40normes%2fdocuments%2fpublication%2fwcms_087987.pdf

principle of justice. That is, individuals may be said to have an individual right to join in collective industrial action to improve their conditions.

Of course, it will be argued that there is no right to strike if it involves a breach of contract. However, no contract can literally force labour – if it did that, it would breach the right to freedom from slavery. Rather, it can only schedule penalties, typically financial, where labour is not performed. In effect, as long as the freedom to contract is limited by the right to freedom from slavery, there is an implied freedom to strike. Thus, it is because of the very lack of complete freedom to make contracts that prevents us having a primary right to bargain that we do have a primary freedom to strike. We cannot, according to Rawls, sign away our basic freedom to refuse to do any particular job.⁴⁰

Of course, a complete ban on bargaining would make striking pointless. We can say we have a fundamental right to strike, but that we won't want to exercise it unless we also have a right to bargain. And we will now argue that there a substantive right to bargain collectively is assured under the second principle of justice.

Second principle

We will now consider labour rights under the second principle of justice. Even in the case of the rights we have argue above are guaranteed under Rawls's first principle, it is useful to assess whether they are supported under the second principle (a) because there are conceivably historical circumstances in which the second principle may be taken to conflict with the first (i.e. where material wellbeing might be taken to conflict with civil rights) and

⁴⁰ Rawls 1971, p.272.

(b) in case our arguments in favour of the inclusion of these rights under the first principle be dismissed.

The second principle of justice has two components: firstly, the so-called ‘difference principle’, which asserts that inequalities must be arranged so as to benefit the least advantaged, and, secondly, the caveat of equality of opportunity between persons.

However, equality of opportunity is not in a strict sense in question where labour rights are concerned, so this is irrelevant to our purposes: equality of opportunity relates to whether someone ends up as a worker or a manager, for example, not the relations that then obtain between people in these positions. Of course, it makes a difference in the workplace if people get their position through the operation of equality of opportunity or not. For Rawls, equality of opportunity is important for reasons such as that it means workers have no reason to resent those in higher-paying positions. However, it does not pertain to any of the core rights of labour. Rather, then, what we have to consider in relation to the second principle is how the difference principle relates to workers’ rights.

Our argument on this point can be expressed in the following syllogism: the difference principle consists in the promotion of the best interests of the poorest; workers’ rights and effective trade unions are in the interests of the poorest; therefore, the difference principle implies state support for workers’ rights and unionism.

While we have already argued under the first principle for two key workers’ rights, the right to organise in unions and the right to strike, these two rights are, we have argued, of little practical value without an associated ability to collectively bargain. From the practical

point of view of producing social justice, and hence from the point of view of the difference principle, these three rights – to unionise, bargain collectively and undertake industrial action – should be viewed as a single compound, much as they are in the ILO Declaration.

One might argue that the difference principle would tend to support any rights that applied to workers, since workers are relatively disadvantaged in relation to their employers. This certainly falls within the ambit of Rawls's argument, since he takes 'the unskilled worker' and 'the working class' as exemplary of the 'worse off' for the purposes of applying the difference principle.⁴¹

A concern here is that generally it is empirically not the case that the most disadvantaged in society are employees. Rather, it is more likely that the most disadvantaged will be *unemployed*. It can be argued that rights of labour impact adversely on the unemployed, for example by leading to less competitive industry, fewer jobs and hence higher unemployment. The classical economic argument against collective bargaining has indeed been that it distorts the price of labour upwards, thus excluding 'outsiders' including the unemployed.⁴² However, the argument has been strongly contested, since higher wages can increase the pool of labour available to employers and in turn increase employment through monopsony effects.⁴³ The unemployed are disproportionately likely to enter employment at or around minimum wages, and it has been demonstrated that those countries where minimum wages are set by collective bargaining are less likely to experience negative

⁴¹ Rawls, *Theory of Justice*, 1971, 78.

⁴² B.T. Bean & J.J. McFadden, *Employee Benefits*, 6th edition (Chicago: Dearborn, 2001)

⁴³ D. Card & A. Krueger, *Myth and Measurement: the New Economics of the Minimum Wage* (Princeton: Princeton University Press, 1995); D. Card & A. Krueger, 'Minimum wages and employment: a case study of the fast-food industry in New Jersey and Pennsylvania: reply, (2000) 90 *American Economic Review*, 5, 1397-1420.

employment effects.⁴⁴ In some countries, small positive employment effects have been observed where minimum wages are collectively bargained.⁴⁵ Empirical information of this sort is available to those in the original position and would indicate that labour rights are in accordance with the difference principle.

One could argue that the plight of the worst off can simply be addressed by giving them money. Rawls was resistant to this conclusion, however. His indifference to the question of public versus private ownership in the *Theory of Justice* was later nuanced by a distinction between five different possible forms of social system.⁴⁶ One of these is what he calls ‘welfare state capitalism’, which he rules against, favouring ‘property-owning democracy’ as a form of capitalism.⁴⁷ What is relevant for our purposes in this is that Rawls does not want a social system that simply treats the poor as passive recipients, but rather one in which people are incentivised to ensure their own wellbeing⁴⁸ This is entirely consonant with the rights of labour: we must, following Rawls, argue for rights enabling people to pursue their own best interests, rather than simply giving them handouts.⁴⁹ This

44 R. Croucher & G. White, The impact of minimum wages on the youth labour market. An international literature review for the Low Pay Commission (London: Low Pay Commission, 2011).

45 P. Böckerman & R. Uusitalo, ‘Minimum wages and youth employment: evidence from the Finnish retail trade sector’ (2009) 47 *British Journal of Industrial Relations*, 2, 388-405.

46 Rawls, *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press, 2001: p. 136.

47 For a useful article on how ‘property owning democracy’ became central to Rawls' thought, see Ron, A. (2008), “Visions Of Democracy In ‘Property-Owning Democracy’: Skelton To Rawls And Beyond” *History of Political Thought*, 29, 89-108

48 Freeman, S. (2017), *Rawls*, (Routledge, New York) at pp.219 – 235 provides various contrasts between Rawls’ ‘property owning democracy’ and ‘welfare state capitalism’ which readers might find useful.

49 “... welfare-state capitalism permits a small class to have a near monopoly on the means of production. Property-owning democracy avoids this, not by the redistribution of income to those with less at the end of each period, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each period, all this against a background of fair equality of opportunity.” Rawls, *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press, 2001: p. 139.

interpretation of Rawls is supported by the work of White (1998), who argues that trade unionism is so compatible with liberal values that he has argued that the state should adopt a promotive, as opposed to neutral, stance toward trade unionism.⁵⁰ Unions are not, primarily, what White terms ‘expressive associations’ which promote particular conceptions of the good. If this were the case, then the state should adopt a ‘neutral’ stance toward them, and should neither encourage nor discourage their emergence or continuation, since from a liberal perspective, including Rawls’s, the state should not side with particular conceptions of the good, but rather have equal respect for all citizens’ conceptions of the good. Unions are, however, ‘instrumental associations’ in that their ‘primary purpose is to secure for [their] members improved access to strategic goods, such as income and wealth, the possession of which is important from the standpoint of more or less any conception of the good life’. Hence, state neutrality can be dispensed with. The strategic goods that unions secure, such as employment, education, training, income and job security, are primary goods that enable different citizens to pursue a diverse range of options.

Consequently, to promote instrumental associations is not to force or impose any specific conception of the good on citizens. More positively, insofar as unions contribute to a more egalitarian distribution of primary goods, the liberal State *should promote them as part of its more general duty to secure justice for its citizens*. How might a promotional stance be carried out? Arguably, the state might include trade unions in structures of public governance such as skills forums or wage settlement through national income policies. This strategy of inclusion in public governance ‘directly promotes union influence, enhances the public utility of unions, and may also thereby enhances the legitimacy of unions in the eyes

⁵⁰ White, S. (1998) “Trade Unionism in a Liberal State” in A Gutmann (ed), *Freedom of Association* (Princeton University Press, 1998), pp. 330 – 356

of the wider citizenry, so encouraging union growth'. White however, makes a qualification for the promotion of trade unionism (pp.340). There is no place for weak and ineffective unionism in his argument, for he asserts that the state should promote a unionism which is both *encompassing* and which *possesses strong capacities for coordinated decision making*.

Bogg (2009) takes this theme further and argues for laws, institutions and the political economy of the State to shape this kind of trade unionism.⁵¹ Since group actions are 'a product of opportunities and incentives that are induced by the structure of political institutions and the substance of political choices', this entails that associational patterns can be *reshaped* through a modification of the regulatory framework that creates those opportunities and incentives. Bargaining institutions and regulatory environments are inextricably linked and mutually reinforcing; States are invariably implicated in the extent to which national institutions promote egalitarianism. Consequently, it is impossible to disentangle the State's own regulatory choices from the egalitarian shortcomings of a particular system of collective bargaining. Accordingly, the liberal egalitarian State is duty-bound to promote encompassing and authoritative bargaining institutions that are well placed to realise egalitarian ends.⁵²

Lastly, even if not guaranteed as a primary basic individual rights, we point to empirical research that demonstrates that the collective rights of labour are necessary to protecting individual rights in the workplace. The lengthy tradition of employment relations scholarship has been based on the argument that the relationship between the individual

⁵¹ Bogg, A. (2009), "New Labour, Trade Unions, and the Liberal State" *King's Law Journal*, 20, pp. 403-434. See also Mantouvalou, V. (2007), "Is there a Human Right Not to be a Trade Union Member? Labour Rights under the ECHR", *LSE Legal Studies Working Paper* No 8/2007.

⁵² Bogg, (2009), p. 426

worker and the employer is structurally weighted towards the latter and collective organisation is required to redress the balance.⁵³ Several influential researchers have shown that individual worker rights are in practice most effectively enforced by collective representation. Harcourt, Wood & Harcourt⁵⁴ demonstrate that despite perceptions that collective and individual rights are mutually exclusive, the possibility of collective action in fact strengthens individual rights in workplaces. Using evidence of employer compliance with anti-age legal provisions in New Zealand, they demonstrate that individual and collective rights are highly complementary: union presence strengthens individual protection from discriminatory treatment. Of significance are their re-iterations that collective voice reduces individual worker's prospects of voicing any concerns they may have, and makes them more difficult for employers to disregard and possibly victimise. Unionised workers are more likely than their non-unionised counterparts to exercise their individual rights in a thorough and comprehensive manner. This includes legal rights, often too costly and difficult for individual workers to enforce.⁵⁵ Addison & Belfield⁵⁶ confirm

⁵³ PK Edwards (2003), *Industrial Relations: Theory and Practice*. Oxford: Blackwell, PK Edwards & J Wajcman, J. (2005), *The Politics of Working Life*. Oxford: Oxford University Press. Labour scholarship in the UK affirming the virtues of free collective bargaining is voluminous and owes its richness to the works of Otto Kahn-Freund in the 1960s and 1970s, see as a sample, O Kahn-Freund (1969), "Industrial Relations and The Law—Retrospect And Prospect" *British Journal of Industrial Relations*, 301 – 316 O Kahn-Freund 'Legal Framework' in A Flanders & H Clegg (eds.) *The System of Industrial Relations in Great Britain: Its History, Law and Institutions*, (Oxford Blackwell), 1954, O Kahn-Freund (1954), 'InterGroup Conflicts and Their Settlement' 5, 3, *British Journal of Sociology*, 193- 22, B Hepple (1997), "New Approaches to International Labour Regulation" *Industrial Law Journal*, 26, 4, 353 – 366, B Hepple (1995), "The Future of Labour Law" *Industrial Law Journal*, 24, 4, 303 – 322, P Davies (1993/1994), "The Representation of Workers in the United Kingdom from Collective Laissez Faire to Market Individualism" *Comparative Labour Law Journal*, 15, 167 – 176, KW Wedderburn *The Worker and The Law*, 3rd ed., 1986, KW Wedderburn (2007), "Labour Law 2008: 40 Years On" *Industrial Law Journal*, 36, 4, 397 – 424

⁵⁴ M Harcourt, G Wood & S Harcourt (2004), "Do Unions Affect Employer Compliance with the Law?" *British Journal of Industrial Relations*, 42(3), 527 – 541.

⁵⁵ Harcourt (2004), at 529 – 530

⁵⁶ J Addison & C Belfield (2004), "Union Voice" *Journal of Labor Research*, 25(4), 583 – 496

these propositions, arguing that individual rights (such as those given by the law or stipulated in the contract between workers and employers), are most effectively enforced by collective organisation and not through individual legal action. Equity and stability are also served by unionisation which has been shown to reduce gender pay differentials and turnover rates and secure greater tenure.⁵⁷ In addition, recent international research suggests that unions tend to reduce race pay differentials for those of different races, genders and sexual orientations.⁵⁸ Further, unionised workplaces have been shown to have lower accident rates and less ill-health than their non-union equivalents.⁵⁹ Thus, collective organisation strengthens individual rights, well-being and equity. Conversely, lack of voice on the part of workers exacerbates existing problems faced by them and increases the possibility that they are treated in ways perceived by individuals as unfair.⁶⁰ For example, even where minimum rights are legally guaranteed in developed countries, as in the case of minimum wages, individual employee weakness can lead to a denial of these rights by relatively strong employers.⁶¹ These above arguments, largely developed in the context of

⁵⁷ D Weichselbaumer & R Winter-Ebner (2003), “A meta-analysis of the international gender pay gap”, *Reihe Oekonomie*, Vienna: Institute for Advanced Studies: pp. 135-155, S Abraham, B Friedman & R Thomas (2005) “The Impact of Union Member on Intent to Leave: Additional Evidence on the Voice Face of Unions” *Employees Responsibilities and Rights Journal*, 17, 4, 201 – 213, R Iverson & D Currihan (2003), “Union participation, Job satisfaction and Employee Turnover: An event history analysis of the exit voice hypothesis” *Industrial Relations*, 42, 101 – 105

⁵⁸ D Meulders, R Plasman & F Rycx (2004), “Introduction: Earnings inequalities, Gender, Race and Sexual orientation”, *International Journal of Manpower* 25(3), 244 – 250

⁵⁹ P James & D Walters (2002), “Worker Representation in Health and Safety: Options for Regulatory Reform”, *Industrial Relations Journal* 33(2), 141–56, P James, R Johnstone, M Quinlan & D Walters (2007), “Regulating Supply Chains to Improve Health and Safety”, *Industrial Law Journal* 36(2), 163–87.

⁶⁰ H Van Buren & M Greenwood (2008), “Enhancing Employee Voice: Are Voluntary Employer Employee Partnerships Enough?” *Journal of Business Ethics*, 81, 209 – 221.

⁶¹ R Croucher & G White (2007), “Enforcing a National Minimum Wage: The British Case”, *Policy Studies* 28, 2, 145 – 161

developed countries, have been shown to apply *a fortiori* in developing countries where formal employment and secure work is a minority case.⁶²

The developing countries context

So far, we have discussed how core labour rights might apply to liberal democracies according to Rawls's principles. Could these rights be argued to have the same weight in developing countries also? Rawls argued that his whole schema of creating a just basic structure applies only to societies which are sufficiently wealthy where it is possible for all citizens to exercise equal basic liberties. In these societies, maintaining equal civil liberties is regarded as deserving special priority (hence the lexical priority of the first principle over the second). Individuals cannot justly trade basic liberties for increased wealth, therefore. This *special conception of justice* prevails in all societies except the poorest and least civilised.⁶³

Where social conditions do not allow the effective establishment of basic liberties, however, one can acknowledge their restriction. Here, for Rawls, his *general conception of justice* applies. The denial of equal liberty can be accepted only if it is necessary to develop the quality of civilisation so that in time the equal freedoms can be enjoyed by all. That is, liberty can only be sacrificed in the service of liberty. Thus Rawls allows for a mixing of the first and second principles, and a blurring of the lexical ordering of the two principles of justice, in societies in which individuals are not able to exercise basic liberties due to the

⁶² R Croucher & E Cotton (2009), *Global Unions, Global Business: Global Union Federations and International Business*. London: Middlesex University Press

⁶³ This conception rules out any trade-off between liberty and other primary goods, although it may allow the restriction of one liberty to enhance another liberty. *Theory of Justice*, 1971: pp. 244, 542, 543.

low level of development of the society. Inequalities of liberty are thus allowed in circumstances where the level of civilisation in society is so low that people would starve; individuals in the original position would conceivably trade off their liberties in exchange for a draconian government, if it could be argued that this would on the whole, be best, even for the least advantaged, for example, because draconian government would meet their most basic needs of food, water and shelter, with the further caveat, as seen above, that this state of affairs was temporary and directed towards developing the economy to the point where a full range of liberties could be afforded to people.⁶⁴ Similarly, the general conception of justice would allow for slavery, if it could be argued that in trading off their civil liberties for economic needs, this would be best on the whole, even for the slaves, for example, because they would be kept in a reasonable condition even if they were forced to work for nothing, and if this would lead to economic development that would allow slavery to be abandoned in time. This might sound unrealistic, but the point is that if it *were* true, then the general conception *would* allow slavery (although the special conception would not). This, importantly for our purposes, would mean that the rights to organise and strike could be restricted under such circumstances. Rawls does not however stipulate *when* a particular society is considered to have attained a minimum level of civilisation; he simply argues that once the minimum level has been attained, individuals behind the ‘veil’ would insist on the ‘lexically ordered’ two principles of justice.⁶⁵

At face value, Rawls’s argument would lend credence to neo-liberal arguments that in developing countries, the rights to organise and bargain collectively (even qua basic

⁶⁴ Harris, JW. (1980), *Ethical Philosophies*, (London: Butterworths), 265

⁶⁵ Bowie, 1980, pp. 116, Harris, 1980, 265

liberties) may be sacrificed in the interests of securing economic growth and raising living standards. The Rawlsian claim can be made that in such countries it is necessary to sacrifice civil liberties temporarily to allow for growth that will foster civilisation in the longer term. Is this a correct application of Rawls, however? Cases where countries would be so impoverished that basic liberties are to be suspended would in a contemporary context be highly unusual. It is doubtful if this can be argued to the generality of developing countries outside of specific natural disaster situations. Moreover, even in such societies Rawls does not advocate the abandonment of basic civil liberties *tout court*: there is always a presumption in favour of such liberties, and they can only be traded off where this is unavoidable and actually in the ultimate interest of producing these liberties. It does not provide a *carte blanche* for governments of developing countries. The denial of basic civil liberties is only justified for the sake of obtaining the largest possible system of rights.

Furthermore, In relation to core labour rights, we would argue that the suspension of these rights does not empirically seem to lead to progress towards a position where more rights can be granted. The absence of such rights seems to impact negatively on societal development. It has been shown that in many countries the liberalisation of economic policies has accompanied increasing social inequalities, with little prospect of progress for workers. Smith, Bolyard & Appolito (1999), for example, contend that it is simplistic to think that economic progress automatically brings about political and civil freedom or that it will necessarily enlarge the social welfare of all citizens. On the contrary, research supports the case for labour rights and shows that labour standards are associated with improved governance, reduced corruption, improved income distribution and wages. Van

der Meulen & Berik (2006) argue that labour regulations designed to protect workers and improve working conditions achieve social objectives and affect international competitiveness. The costs of raising and enforcing labour standards are actually offset by dynamic efficiency gains and macroeconomic effects. Last but not least, Scherrer (2007) argues that the development and expansion of the trading system of developing countries have not led to an improvement in living and working conditions. In actual fact, developing countries are limited in their ability to raise labour standards on their own.

It is worth noting that the current neo-liberal trend is to structure laws and policies to the disadvantage of workers in *both* developed and developing countries.⁶⁶ This trend is thus not fundamentally linked to a Rawlsian developmental logic, but is rather simply a ubiquitous claim that removing labour rights can lead to higher growth, which benefits everyone; this claim is implausible for reasons we have already indicated. The restriction of core labour rights has ramifications reverberating far beyond the workplace, affecting them and their families negatively – by taking away their dignity as individuals, lowering their quality of life and impoverishing them.

Scherrer makes the case for worker rights to be negotiated internationally.⁶⁷ This seems in line with the obvious conclusion from the evidence that labour rights are to the benefit of

⁶⁶ ITUC (2010) *supra*

⁶⁷ Smith, J. Bolyard, M. & Ippolito, A. (1999) “Human Rights and the Global Economy: A Response to Meyer”, *Human Rights Quarterly*, 21, 1, 207 – 219, Palley, T. (2005), “Labour Standards, Democracy and Wages: Some Cross Country Evidence” *Journal of International Development*, 17, 1–16, Van Der Meulen, Y. & Berik, G. (2006), “Asia’s Race to Capture Post-MFA Markets: A Snapshot of Labor Standards, Compliance, and Impacts on Competitiveness” *Asian Development Review*, 23, 1, 55–86, Scherrer, C. (2007), “International Workers’ Rights and Competitiveness” *Labour, Capital and Society*, 40(1/2), 135 – 159

the least advantaged in societies at various development: that the basic rights of workers ought to be universally recognised, since there is no good reason for them not to be recognised in any country in a state of civil stability (although, as mentioned above, we allow that the suspension of these rights might be necessary in situations of national emergency).

As noted before, however, the international applicability of Rawls's theory of justice is contested. Some have argued that the original position ought to pertain to the whole world, that is, that we need a single, universal, worldwide account of justice stemming from a single original position valid for the whole world, effectively then treating humanity as a single global society. If we take that view, then the question is now settled. This is not Rawls's own view, however. Rawls takes it that the world is divided into national societies and that each one in effect requires its own original position and theory of justice. In *Law of Peoples*, he develops a theory of just international arrangements, via a second-order, international original position, in which representatives of nations meet not knowing which nations they come from, in order to decide on the principles governing international relations within a larger 'society of peoples'. This does not then involve coming up with a universal vision of how all societies should work, but rather a system for societies to relate to one another.

There would for Rawls within such an international order be certain core 'human rights' which would be enforceable throughout the world. That is, one nation may enforce them in

the territory of another, and states that violate them are designated as ‘outlaw states’. As with right under the First Principle in the *Theory of Justice*, however, Rawls does not spell out what rights are human rights exactly, rather only giving a sample. Freedom of association is not in this sample, but ‘freedom from slavery and serfdom’ is.⁶⁸ It in any case seems quite unlikely that collective bargaining and the full panoply of human rights could claim the full status of human rights in Rawls’s schema. Thus, it would be implausible to suggest that by Rawls’s lights one could justly enforce the core rights of labour internationally.

Rawls does think we in developed countries have a duty to aid ‘burdened societies’, in which a liberal political culture is not developed, to develop such a culture.⁶⁹ By our above arguments this should include the education of these countries in labour standards, but it does not imply the construction of formal international labour standards – though Rawls certainly does not say anything to rule these out per se. Similarly, while he does not include an international labour organisation in the list of international agencies he thinks desirable, there is nothing about the International Labour Organisation that contravenes Rawls’s Law of Peoples, since states join it voluntarily. That said, it is not clear from a strictly Rawlsian point of view why states would join it, that is, why states would want to establish uniform principles for labour rights. This points to a lacuna in Rawls’s international theory, inasmuch as it misses out the international actors involved in the tripartite structure of the ILO alongside states: employers and workers. Both of these groups in their own way have mobility beyond states, which Rawls signals no desire to curtail. Labour and employers, each in their own way in competition with others internationally, of course wish to establish

⁶⁸ J Rawls, *Law of Peoples*, Cambridge, MA: Harvard University Press, p.79.

⁶⁹ J Rawls, *Law of Peoples*, Cambridge, MA: Harvard University Press, p. 37

consistency, a 'level playing field' in labour rights. Workers in particular have reason to care about the lot of workers in other countries, because of the fear that worse conditions elsewhere means lower wages, producing a downward pressure on wages worldwide. To prevent a race to the bottom in labour conditions, workers will naturally desire internationally recognised minimum standards. Whatever its basis, international solidarity between workers is ignored in Rawls's neo-Westphalian approach to the international. The international dimension to labour relations is a dimension of international relations which Rawls's theory, unlike cosmopolitan interpretations of his theory, cannot account for. One can presume that actions of labour in support of international aims are allowable under Rawls's theory of justice, as explained above, but there is no basis to examine the legitimacy of such actions in their specificity, because there of the exclusively national frame of Rawls's theory.

Those, on the other hand, Thomas Pogge most prominently, who have chosen to take Rawls's basic theory of justice as globally valid, with the difference principle applying globally, rather than accept Rawls's position that the international dimension is governed by its own specific rules quite distinct from those described in the *Theory of Justice*, could be taken to advocate a broader range of international rights norms which would encompass anything allowed under the basic theory. This would allow an argument for the global applicability of ILO core labour rights. This is of course still something quite different to universal *enforcement* of these rights, implying the nullification of the sovereignty of individual countries in favour of international institutions. The question of whether such a cosmopolitan rights regime is appropriate is quite outside of the scope of this article. We find Rawls's own attempt to think justice internationally to be inadequate to the task when

it comes to labour rights, however, and as such we think such enforcement measures as currently are attempted in pursuit of international labour standards to be justified.

Conclusion

In accordance with Rawls's theories, we can conclude the following. Firstly, in line with his first principle of justice, the right to strike and the right to belong to a union can be considered core rights that all liberal democracies should allow. Secondly, by his second principle, labour rights in general should be understood as necessary to social justice, such that liberal democracies should actively encourage the activity of unions. Lastly, by the 'duty of assistance' in his *Law of Peoples*, in combination with our prior conclusions, aid should be given to assist countries which lack labour rights standards countries in producing a decent framework of rights and organisations for workers, as an aid to the development of those countries' political societies, and as beneficial to the development of their economies.